

64 FLRA No. 181

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
GETTYSBURG NATIONAL MILITARY PARK
GETTYSBURG, PENNSYLVANIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3145
(Union)

0-AR-4283

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DECISION

June 29, 2010

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Stanley J. Schwartz filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception.

In a previous award (the original award), the Arbitrator found that the Agency improperly revoked the grievant's law-enforcement commission. In *United States Department of the Interior, National Park Service, Gettysburg National Military Park*, 61 FLRA 849 (2006) (*Interior*) (Member Pope writing separately), the Authority denied exceptions to the original award. In the award at issue here (the compliance award), the Arbitrator found that the Agency failed to comply with the original award.

For the reasons that follow, we deny the Agency's exception.

II. Background and Arbitrator's Awards

The grievant was employed as a park ranger in a position that required him to maintain a law-enforcement commission. 61 FLRA at 849. The Agency revoked the grievant's commission and subsequently removed him from his position based on, as relevant here, the loss of his commission. *Id.* The Union filed a grievance challenging the revocation of the commission (the commission grievance), and the grievant filed a separate grievance challenging his removal (the removal grievance). *Id.*

A different arbitrator resolved the removal grievance and found that there was no just cause for the removal. *Id.* at 849-50. That arbitrator directed the Agency to assist with the placement of the grievant in a suitable non-commissioned position, and also awarded backpay. *Id.* at 850.

The Arbitrator in the case now before the Authority resolved the commission grievance and found, in the original award, that the Agency improperly revoked the commission. *Id.* Specifically, the Arbitrator found that the grievant "should have been permitted to retain his law enforcement commission," and he directed the Agency to "[r]einstate the grievant's law enforcement commission retroactive to the date it was revoked." Original Award at 6. The Agency filed exceptions to the original award, which the Authority denied in *Interior*.¹

After the Authority issued the decision in *Interior*, the Agency reinstated the grievant's commission, but only to an "inactive status[.]" rather than the "active status[.]" commission that he previously had held.² Compliance Award at 5. The Agency did so on the ground that the grievant had not performed law-enforcement duties for several years, and stated in a memorandum (the Agency memo) to

1. The Authority -- at the time, consisting of Chairman Cabaniss and then-Member Pope -- found that it had jurisdiction to resolve the exceptions, despite the fact that the grievant's removal had been based in part on the revocation of his commission. 61 FLRA at 851-52. Then-Member Pope wrote separately, stating that normally she would find that the Authority lacked jurisdiction because the award related to a removal, but that, as she otherwise would deny the exceptions on the merits, she joined with Chairman Cabaniss in dismissing the exceptions in order to avoid an impasse in issuing the decision. *Id.* at 853.

2. We note that, as discussed further below, the Agency does not dispute that the grievant's commission had been an active commission.

the grievant that he needed to meet certain criteria, including completion of basic law-enforcement training, before his commission could be restored to active status. *Id.*

The parties disputed whether the Agency had complied with the original award, and they submitted the dispute to the Arbitrator. The Arbitrator framed the issue, in pertinent part, as whether the requirements set forth in the Agency memo “outlining the terms and conditions for ‘reinstating’ [the grievant’s] law enforcement commission to ‘active’ (i.e., good standing) status constitute compliance with the [original award]?” If not, what shall be the remedy?” *Id.* at 2.

In the compliance award, the Arbitrator stated that the original award was “clear and unambiguous[]” and had “directed the Agency to return [the grievant] to the law enforcement commission he held prior to the Agency’s removal retroactive to the date it was revoked.” *Id.* at 7. The Arbitrator also stated that the commission had been “an active” commission. *Id.* In addition, the Arbitrator asserted that, given his previous finding that the Agency improperly revoked the commission, “for all intents and purposes, the commission was never revoked[,]” so “there can be no ‘lapse’ in the grievant’s commission[]” that would require the grievant to complete basic training. *Id.* In this connection, the Arbitrator stated that, “[i]nsofar as the grievant’s commission was never validly revoked, he should never have been placed in an ‘inactive status[.]’” *Id.* at 8 n.7.

The Arbitrator determined that the Agency was attempting to engage in “an improper collateral attack upon” the original award. *Id.* at 8. Further, the Arbitrator determined that the Agency had engaged in certain actions that were “responsible for the substantial delay in returning [the grievant] to his prior position.” *Id.* The Arbitrator stated that “[t]he Agency cannot now be permitted to utilize this delay as a justification to impose conditions upon the reinstatement of the grievant’s ‘active status’ that would not be applicable to similarly-situated employees who had not experienced the adverse consequences of a wrongful revocation of their commissions.” *Id.* (footnote omitted).

The Arbitrator concluded that the Agency had failed to comply with the original award, and he directed the Agency to, among other things, reinstate the grievant’s commission to active status retroactive to the date it was revoked. *Id.* at 9-10. The Arbitrator stated that the Agency had discretion to

require the grievant to conduct certain training, “not [to] exceed a period of more than . . . five (5) weeks (200 hours) of training [the grievant] would have been required to undergo had his law enforcement commission not been revoked during the pendency of these proceedings.” *Id.* at 10.

III. Positions of the Parties

A. Agency Exception

The Agency argues that the compliance award is contrary to management’s right to assign work under § 7106(a)(2)(B) of the Statute. In this regard, the Agency contends that training during duty hours constitutes an assignment of work, and the Arbitrator “had no authority to waive the [A]gency’s requirement that any law enforcement ranger who has not held an active law enforcement commission for 3 years must attend” basic training for eighteen weeks. Exception at 4. According to the Agency, this requirement, which is set forth in Agency policy, is “consistent with the high standards set for law enforcement officers throughout the federal government[,]” and the Arbitrator had “no right to waive a standard that is aim[.]ed solely at protecting the safety of the general public and the employee.” *Id.* at 5, 6.

B. Union Opposition

The Union argues that the Agency’s exception should be dismissed because the Authority lacks jurisdiction to resolve it. Opp’n at 3-5. In this connection, the Union asserts that the award relates to the grievant’s removal and his corresponding reduction in pay, and “urges the Authority to reconsider” *Interior* insofar as it held that the Authority has jurisdiction. *Id.* at 4-5. In addition, the Union contends that the exception constitutes an improper collateral attack on the original award. *Id.* at 8. Finally, the Union argues that the Arbitrator found that the processing of the revocation was “procedurally defective[,]” and that the Agency failed to file an exception to that finding. *Id.* at 7.

IV. Analysis and Conclusions

A. The Union’s request for reconsideration of *Interior* is untimely.

The Union argues that the Authority should reconsider *Interior* and dismiss the Agency’s exception on jurisdictional grounds. The Authority has held that issues regarding Authority jurisdiction may be raised at any stage of the Authority’s

proceedings. *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010). However, the Authority has clarified that this principle permits parties to raise jurisdictional arguments "without regard to *exhaustion* requirements[]" -- i.e., without regard to whether they were raised in proceedings below -- and not "without regard to *procedural* requirements." *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 355, 358 n.6 (2009) (Member Beck concurring in part and dissenting in part). Thus, the Union's request for reconsideration is required to comply with the Authority's procedural requirements, including 5 C.F.R. § 2429.17.

Section 2429.17 of the Authority's Regulations requires parties to file motions for reconsideration of an Authority decision "within ten (10) days after service of the Authority's decision[.]" 5 C.F.R. § 2429.17. The Union's request that the Authority reconsider *Interior* was not filed within ten days after service of the Authority's decision in *Interior* and, thus, is untimely. Accordingly, we dismiss the request.

- B. The exception constitutes an improper collateral attack on the merits of the original award.

When a party fails to file timely exceptions to an arbitration award under § 7122(a) of the Statute, the award becomes final and binding, and the agency must take such actions as are required by the award and cannot challenge the terms of that award. *U.S. DOD, DOD Dependents Schs.*, 54 FLRA 773, 782 (1998); *U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 159 (1995). Consistent with this principle, when a party fails to except to an arbitrator's finding on a particular issue, the party cannot, in exceptions to a later award, collaterally attack the previously unexcepted-to findings. *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 72, 75 (2001) (VA). See also *U.S. Dep't of HHS, Navajo Area Indian Health Serv., Window Rock, Ariz.*, 56 FLRA 1035, 1038 (2000); *NAGE, Local R4-106*, 55 FLRA 676, 677 (1999). Thus, where an agency could have made a management-rights argument in its exceptions to an initial award, it cannot later collaterally attack the arbitrator's finding on the relevant issue. VA, 57 FLRA at 75.

Further, when an arbitrator has issued more than one award concerning a matter, the timeliness of an exception is calculated on the basis of the award that

gives rise to the deficiency alleged in the exception. *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 64 FLRA 437, 438 (2010) (*BOP*). Where an arbitrator's subsequent award was "advising the parties of the clear intent of the remedy [the arbitrator] had ordered previously[.]" the Authority has found exceptions to the subsequent award to be untimely filed because the exceptions related to the original award, and not the subsequent award. *Id.* at 439 (quoting *NTEU, NTEU Chapter 33*, 44 FLRA 252, 268 (1992)).

As discussed previously, in the original award, the Arbitrator found that the grievant "should have been permitted to retain his law enforcement commission," and directed the Agency to "[r]einstatement the grievant's law enforcement commission retroactive to the date it was revoked." Original Award at 6. In the compliance award, the Arbitrator found that the grievant's law-enforcement commission had been an active commission. Compliance Award at 7. The Agency does not dispute this finding or argue that the original award was unclear with respect to what type of commission the Agency was required to reinstate. Thus, as in *BOP*, 64 FLRA 437, the deficiency giving rise to the exception was set forth in the original award, not the compliance award. The Agency's exception, effectively arguing that it cannot reinstate the commission to an active status, constitutes an improper collateral attack on the original award. Thus, we deny the exception.

V. Decision

The Agency's exception is denied.